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NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

V.

JOYCE GLASS McCRARY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

OF
CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
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Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Does a party to whom a statute forbidding possession of counterfeit drugs obviously applies have standing to raise the statute's alleged unconstitutional vagueness as to other persons?

2. Where a statute has been judicially construed to require scienter, does the fact that the statute's language makes no express reference to scienter render the statute unconstitutionally vague?

3. Is a statute which has been judicially construed as requiring scienter, rendered unconstitutionally vague by the fact that it does not require a specific intent?

4. Is a clear and concise statute rendered unconstitutionally vague by the fact that it relates to a subject which a certain court considers socially harmless?

THE PARTIES

In the Circuit Court of Jackson County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Joyce McCrary, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Jackson County, Alabama and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama reversing Respondent McCrary's conviction is not as yet reported but will be reported as follows:

McCrary v. State, ____ So. 2d ____ (Cr. App. Ala., 1982)

A copy of the same is submitted in Appendix "A" to this petition.

The orders of the Supreme Court of Alabama granting and then quashing the writ of certiorari in this case are not as yet reported but will be reported as follows:

Ex parte: State; In re: McCrary v. State, ____ So. 2d ____ (S. Ct. Ala., 1983)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama quashing the writ in this case was issued on April 8, 1983, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Criminal Appeals of Alabama found the statute under which Respondent McCrary was convicted to be repugnant to the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws..."

STATUTORY PROVISIONS INVOLVED

At issue in this case is the constitutionality of Title 20, Section 20-2-70, Code of Alabama, 1975, as regards the possession of counterfeit drugs. A copy of this statute is submitted as Appendix "C" to this petition. The particular portion of this statute which the Alabama Courts found unconstitutionally vague reads as follows:

"...(b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more

that 15 years and may be fined not more than $25,000.00" (Title 20, Section 20-2-70, Code of Alabama, 1975; Appendix "C")

STATEMENT OF THE CASE

Following her conviction for possessing, selling, furnishing or giving away counterfeit controlled substances,[1] Respondent McCrary appealed to the Court of Criminal Appeals of Alabama. (R. pp. 70-71; 89 and 90)

On August 24, 1982, the Honorable Court of Criminal Appeals of Alabama reversed Respondent McCrary's conviction on the grounds that the statute under which she was convicted is allegedly unconstitutionally vague. As to Respondent McCrary's standing to raise vagueness in light of the statute's obvious

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[1]Title 20, Section 20-2-70(b), Code of Alabama, 1975; Appendix "C".

application to her, the Court followed several old Alabama Supreme Court opinions[2] allowing any defendant to raise a claim of vagueness without regard to the facts of his or her own case. The Court's finding of vagueness was based not on the statute's language but on considerations involving social harm, scienter and specific intent. McCrary v. State, ____ So. 2d ____ [Cr. App. Ala., 1982]; Appendix "A").

The State's application for rehearing raising substantially the same points raised here was overruled on October 12, 1982. (Appendix "A", p. 27)

The State petitioned the Supreme Court of Alabama for a writ of certiorari raising these same points and expressly asking the Alabama Supreme Court to

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[2]Kahally v. State, 254 Ala. 482, 48 So. 2d 794 (1950); Esco v. State, 278 Ala. 641, 179 So. 2d 766 (1965)

overrule its earlier opinions on standing to raise vagueness, so as to bring the law of Alabama into conformity with the teachings of this Honorable Court.[3]

On January 4, 1983, the Alabama Supreme Court found probable merit in the

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[3]Ground 8 of the State's petition in the Alabama Supreme Court read as follows:

> "...8. The Honorable Court of Criminal Appeals reached its decision in reliance on this Honorable Court's decisions and opinions in Kahally v. State, (254 Ala. 482, 48 So. 2d 794 [1950]) and Esco v. State, (278 Ala. 641, 179 So. 2d 766 [1965]), and the State is seeking to have these cases overruled to the extent that they authorize persons to whom a statute clearly applies to raise questions of vagueness as to the statute's application to others...."

In its supportive brief the State argued that Kahally and Esco were contrary to the decisions and opinions of the United States Supreme Court.

petition and granted the writ. Respondent McCrary declined to file a brief, and the case was submitted on January 31, 1983. However on April 8, 1983, the Alabama Supreme Court quashed the writ "...as improvidently granted...." without opinion. (Ex parte: State; In re: McCrary v. State, ____ So. 2d ____ [S. Ct. Ala., 1983]; Appendix "B")

STATEMENT OF THE FACTS

The Petition is based on the following facts, as found by the Court of Criminal Appeals of Alabama:

> "The State's evidence proved that two Scottsboro police officers, armed with a search warrant, went to appellant's [i.e. Respondent McCrary's] residence, showed her the warrant, and told her they were authorized to search

for Quaaludes or methaqualone. Upon reading the warrant, appellant replied, 'All that's here are those old fake pills,' and 'That's those old pills I have in the back room,' or words to that effect. The appellant then brought out a bottle containing 415 white pills stamped "LEMMON 714" and scored on the back.

"One of the officers familiar with the appearance of Quaaludes testified that the pills looked exactly like those containing the controlled substance to him. A preliminary analysis of the pills at Scottsboro police headquarters, however,

indicated they did not contain the controlled substance methaqualone. The toxicologist's analysis, and later testimony, confirmed the finding that the capsules did not contain methaqualone or any other controlled substances, but compounds resembling aspirin and antihistamine.

"An official of the Lemmon Corporation testified that his company manfactured a drug containing methaqulaone, under the trade name 'Quaalude.' The pill is stamped 'LEMMON 714' and scored on the reverse side. He testified that the pills found at appellant's residence were not manufactured by his company although they were 'a

very good imitation.' He also stated that Lemmon had not authorized anyone to make a facsimile Quaalude...."

(McCrary v. State, ____ So. 2d ____ [Cr. App. Ala., 1982]; Appendix "A", pp. 1-3)

SUMMARY OF THE ARGUMENT

The statute is clear and unambiguous on its face. The Alabama Courts ruled the statute vague on the basis of matters which are irrelevant to vagueness. Respondent McCrary was allowed to raise vagueness even though the statute obviously applied to her. In all of this the Alabama Courts ruled contrary to the policies, decisions and opinions of this Honorable Court.

I. This Honorable Court has a well established policy that: Except in the

area of expression a statute will not be struck down for vagueness on the basis of "...hypothetical cases which may never arise...." Robinson v. United States, 324 U.S. 282, 286, 89 L. Ed. 944, 947, 65 S. Ct. 666 (1945) The Alabama Courts have nearly the opposite policy: Except in one area, which happens to involve expression, statutes will be tested for vagueness against any conceivable hypothetical case.

The writ should issue to resolve this conflict.

II. In declaring this statute unconstitutionally vague, the State Courts ruled contrary to all of those decisions of this Honorable Court on what constitutes vagueness in a statute. In relating vagueness to "social harm" as measured by a given court, the Alabama

Courts established a rule which defeats "...the most important aspect of the vagueness doctrine...." Kolender v. Lawson, ____ U.S. ____, ____ L. Ed. 2d ____, ____ S. Ct. ____, 51 U.S. L. Wk. 4532, 4534 (1983) The Alabama Courts also ruled contrary to the decisions of this Honorable Court on:

1. The right of the legislative branch to determine social harm.

2. The need to consider judicial construction in reviewing a statute for alleged vagueness.

3. The relationship of scienter and specific intent to vagueness.

ARGUMENT

Title 20, Section 20-2-70, Code of Alabama, 1975, (Appendix "C") provides in pertinent part:

> "...(a) Except as authorized by this chapter, any person who possesses, sells, furnishes, gives away, obtains or attempts to obtain by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or written order or by the concealment of material fact or by use of false name or giving a false address controlled substances enumerated in schedules I, II, III, IV and V is guilty of a felony...." (Appendix "C")

The expressions "possesses", "sells", "furnishes", "gives away", etc. are not terms of art, but are common expressions which are used in their common meanings. These expressions are precise. Although the statute does not use the word "knowingly" or other words referring to scienter, the Alabama Supreme Court has construed the statute as requiring knowledge. Walker v. State, 356 So. 2d 672 (S. Ct. Ala., 1977) Thus, the statute as construed reads: "...any

person who [knowingly] possesses, sells, etc...." No one could read this statute and fail to know exactly what conduct the statute is outlawing.

Respondent McCrary was not convicted under subsection "a" of this statute but under subsection "b", which reads, in pertinent part:

> "...(b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony...." (Appendix "C")

Thus all of the requirements of subsection "a" above, <u>including scienter</u>, are incorporated by reference into subsection "b". "Counterfeit substance" would appear to be a self-defining expression but is, nonetheless, defined as follows:

> "...(6) COUNTERFEIT SUBSTANCE. Substances which, or the container or labeling of which, without authorization, bears

> the trademark, trade name or other identifying mark, imprint, number or device or any likeness thereof of a manufacturer, distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the substance. (Title 20, Section 20-2-2, Code of Alabama, 1975; Appendix "C")

The Alabama Court of Criminal Appeals held that this statute was unconstitutionally vague as applied to possession of counterfeit substances, because the statute as drafted does not expressly require scienter, because the statute does not require specific intent, and because possession of counterfeit controlled substances is allegedly not socially harmful. The Court allowed Respondent McCrary to raise vagueness even though, under the unconflicting evidence, the statute clearly applied to her. In so ruling the Alabama Courts ruled contrary to numerous decisions of this Honorable Court.

I.

ON STANDING

REASON FOR GRANTING THE WRIT: CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT.

A law is essentially an idea but to have any practical effect that idea must be communicated by the means of words. Ideas are abstract, while words are material and concrete. No matter how carefully language is framed, it never precisely covers the idea. This is the key problem in statutory drafting: How to express the legislature's intent, covering the subjects of legislative concern, without extending beyond the limits of those concerns. At the same time, a statute must be worded with sufficient prescision to inform individuals and the Courts of what is required or forbidden. If each statute had to meet all of these requirements

perfectly on its face, legislation would be a practical impossibility. However, statutes need not meet each of these requirements on their face. If a statute clearly defines the forbidden or mandated conduct, many questions about the statute's applicability to unusual or unanticipated situations can be left to the commonsense and good will of the executive and judicial branches of the government. It is in this context that this Honorable Court has established the principle that, except in the area of expression, the alleged vagueness of a statute will not be tested in the abstract but only as applicable to a particular case. Robinson v. United States,[4] 324 U.S. 282, 89 L. Ed. 2d 944,

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[4]"...It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all. We (con't)

65 S. Ct. 666 (1945); United States v. National Dairy Products Corp.[5], 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963)

Now, Alabama has for many years tested statutes for vagueness against "...hypothetical cases which may never

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footnote 4 con't

do not know what provision of law, Constitutional or statutory, gives us power wholly to nullify the clearly expressed purpose of Congress to authorize the death penalty because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise...." (324 U.S. 282, 286, 89 L. Ed. 944, 947)

[5]"...Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harriss, 347 U.S. 612, 617, 98 L. ed. 989, 996, 74 S. Ct. 808 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged...." (372 U.S. 29, 32-33, 9 L. Ed. 561, 565-566)

arise...." Robinson, above. In Kahalley v. State, (254 Ala. 482, 48 So. 2d 794 [1950]), the Alabama Supreme Court condemned as vague and "...repugnant to the Fourteenth Amendment [to] the U.S. Constitution...." (485 So. 2d 794, 796), a statute outlawing "unlawful peeping." The court observed that, "...undoubtedly, ...[the statute]...was intended to serve a useful purpose and bring to justice so-called 'Peeping Toms'...." (485 So. 2d 794, 795), but then the Court went to great lengths to list numerous "innocent situations" which were possibly covered by the statute's language. The Court never states what Kahalley himself did, and it did not seem to matter, since there were so many "innocent" hypothetical cases to which the statute could have applied. On a similar analysis a statute outlawing changing

one's name to conceal identity was struck down in Esco v. State, (278 Ala. 641, 179 So. 2d 766 [1965]). Again, the Court struck down the statute with a lengthy examination of hypothetical applications of the statute but no hint as to Esco's own conduct. The Alabama Supreme Court ruled that the statute was "...unconstitutional as to deny the requirements of due process under the doctrine of Kahalley...." Esco, 179 So. 2d 766, 771.[6] These cases are in patent conflict with this Honorable Court's policy on standing to raise the alleged vagueness of a statute, but the conflict does not stop there.

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[6]All of the Alabama cases in this area demonstrate a confusion of vagueness and overbreadth.

In 1979 the Court of Civil Appeals of Alabama struck down as unconstitutionally vague a liquor regulation, which disallowed "...topless or bottomless dancers or performers...." Blood Brothers Inc. v. Alabama Alcoholic Beverage Control Board, 386 So. 2d 218 (Civ. App. Ala. 1979) However, the Alabama Supreme Court reversed holding that, since the regulation clearly barred the activity at the lounge in question, Blood Brothers had no standing to raise the vagueness issue. Blood Brothers Inc. v. Alabama Alcoholic Beverage Control Board, 386 So. 2d 220 (S. Ct. Ala., 1980) Although neither Court mentioned Kahalley or Esco, there was a strong suggestion that those cases had been superceded. Such a suggestion can not survive the instant case. Here the Court of Criminal Appeals of Alabama relied on Kahalley and

Esco to give Respondent McCrary standing to raise the question of the alleged vagueness of this statute. The fact the Alabama Supreme Court first granted review and then quashed the writ, demonstrates that Kahalley and Esco are still the law except in the area of nude cabaret performances. Such performances, of course, involve expression.[7] Therefore, the Alabama rule on standing to raise questions of the alleged vagueness of a statute is:

> "Except in a certain area which involves expression, the alleged vagueness of a statute as to any hypothetical

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[7]"...While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression...." California v. LaRue, 409 U.S. 109, 119, 34 L. Ed. 2d 342, 352, 93 S. Ct. 390 (1972)

application may be raised by anyone."

This is nearly the opposite of the rule long followed by this Honorable Court.

In the instant case Respondent McCrary was in possession of 415 pills which were stamped "Lemmon 714." A police officer familiar with the quaaludes manufactured by the Lemmon Company testified that they looked exactly like the genuine article. An official of the company testified that the pills were "a very good imitation." These pills were perfect examples of counterfeit substances as defined by the statute. Title 20, Section 20-2-2(6), Code of Alabama, 1975; Appendix "C". At the time she was served with the search warrant Respondent McCrary made an unsolicited volunteered statement acknowledging her possession of "fake

pills." Obviously, the statute applied to Respondent McCrary. Yet the State Court of Appeals following Kahalley and Esco allowed her to raise a claim of vagueness.

The long standing policy of this Honorable Court is against examining allegations of vagueness against "...hypothetical cases which may never arise...." See footnote 4, page 18. In Young v. American Mini Theatres (427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 [1976]) this Honorable Court rejected a vagueness claim with these words:

> "...[E]ven if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents...To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected...." (427 U.S. 50, 58-59, 49 L.Ed.2d 310, 319)

See also Hoffman Estates v. Flipside, ____ U.S. ____, 71 L. Ed. 2d 362, 102 S. Ct. (1982) This policy is consistent with this Court's broader policy on standing to raise constitutional questions. This policy was restated only last year in New York v. Ferber, (___ U.S. ___, 73 L.Ed.2d 1113, 102 S.C. ___ [1982]. There your Honors wrote:

> " . . . The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. . ." (73 L.Ed.2d 1113, 1129).

Since the long standing rule followed in Alabama on standing to raise vagueness under the Fourteenth Amendment is in complete conflict with the rule of this Honorable Court, the writ should issue so that the United States

Constitution will be properly applied in Alabama.

II.

THE STATE COURTS MISAPPLIED THE U.S. CONSTITUTIONAL STANDARDS FOR MEASURING VAGUENESS IN STATUTES

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING DECISIONS OF THE SUPREME COURT

That the mischief of the Alabama rule on vagueness goes beyond standing to matters of substance is clearly demonstrated by this case. The Alabama Court of Criminal Appeals correctly stated the vaguenss doctrine of this Honorable Court:

> "The doctrine of vagueness... originates in the due process clause of the Fourteenth Amendment, see Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), and is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful, see United States v. National Dairy

Products Corporation, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963)

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989, 996 (1954). A vague statute does not give adequate notice of the required conduct to one who would avoid its penalties, Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367, 371 (1951), is not sufficiently focused to forewarn of both its reach and coverage, United States v. National Dairy Products Corporation, 372 U.S. at 33, 83 S.Ct. at 598, 9 L.Ed.2d at 566, and may trap the innocent by not providing fair warning, Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227-28 (1972).

"As the United States Supreme Court observed in Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948):

> 'There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt.'
>
> 333 U.S. at 515-16, 68 S.Ct. at 670, 92 L.Ed.2d at 849-50 (citations omitted).... "(McCrary v. State, ____ So. 2d ____ [Cr. App. Ala., 1982] Appendix A, pp. 9-11)

Had the Court of Appeals followed these principles, the State of Alabama would not be burdening this Honorable Court with this petition. Manifestly Title 20, Section 20-2-70(b), Code of Alabama, 1975, contains clear notice of what is forbidden and a clear standard of guilt. However, the Court of Criminal Appeals did not apply the principles of this Honorable Court but shifted from Winters v. New York, with its concern for

"ascertainable standards of guilt" to Kahalley v. State, (254 Ala. 482, 48 So. 2d 794 [1950]) and Esco v. State, (278 Ala. 641, 179 So. 2d 766 [1965]), with their long listings of "hypothetical cases which may never arise." Although the Court of Criminal Appeals could not think of any innocent uses for counterfeit controlled substances (who could?), it applied these cases thusly:

> Similarly, § 20-2-70(b) "marks no line between lawfulness and criminality," Kahalley v. State, supra. It proscribes the possession of a substance which, by its nature, is essentially harmless.[8] A "counterfeit substance" becomes injurious to the public health, safety or welfare only with the addition of a specific intent

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[8]Although the social harm of counterfeit drugs would appear to be obvious, the State of Alabama filed in the Alabama Supreme Court an appendix to its brief reproducing eight learned articles, totaling some 34 pages, on the social harm of counterfeit drugs.

> on the part of its possessor to pass it off or to represent it as genuine.... (Appendix "A", p. 14)

Thus, in the Court of Criminal Appeal's view, vagueness becomes a function of social harm. And, since social harm is largely a matter of opinion,[9] vagueness no longer relates to notice nor the standard of guilt but addresses itself to the social values of a given court. This is an interesting development, since one of the reasons[10] for the policy against vagueness in statutes is that:

> "...A vague law impermissibly delegates basic policy matters to policemen, Judges, and Juries for resolution on an ad hoc and subjective basis, with

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[9]Of course, many people consider genuine controlled substances to be socially harmless.

[10]In fact this reason now appears to be "...the more important aspect of the vagueness doctrine...." Kolender v. Lawson, ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 51 U.S. L. Wk. 4532, 4534 (1983)

> the attendant dangers of arbitrary and discriminatory applications...." (Hoffman Estates v. Flipside, ____ U.S. ____, 71 L.Ed.2d 362, 371, 102 S.Ct. ____ [1982]; quoting from Grayned v. Rockford, 408 U.S. 104, 108, 33 L.Ed.2d 222, 227-228, 92 S. Ct. 2294 [1972]) (Emphasis supplied)

Thus, the Alabama Courts have come up with a rule which not only does not follow the policy of this Honorable Court but which actually produces the result that this Court's policy is designed to prevent. Social harm addresses itself to legislative not judicial discretion. Day-bright Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 96 L.Ed. 469, 472, 72 S.Ct. 511 (1954); New Orleans v. Dukes, 427 U.S. 297, 302, 49 L.Ed.2d 511, 517, 96 S.Ct. 2513 (1976); Young v. American Mini Theaters, Inc., 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976); Penn Central Transportation Co. v. New York, 438 U.S. 104, 57 L.Ed. 2d 631, 98 S.Ct.

2646 (1978). This is also the law of Alabama. Mobile v. Yuille, 3 Ala. 137 (1841); McCraney v. Leeds, 241 Ala. 198, 1 So. 2d 894 (1941); Tyson v. Johns-Manville Corp., 399 So. 2d 263, 271 (S. Ct. Ala., 1981).

The Alabama Courts also misapplied this Honorable Court's teachings on scienter requirements as they relate to vagueness.

First, the Court of Criminal Appeals recognized that the statute had been judicially construed as requiring scienter.[11] Then the Court concluded

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11"...In Walker v. State, [356 So.2d 672 (S.Ct. Ala., 1977)], supra, the Alabama Supreme Court recognized the State's authority under the police power 'to impose strict liability in connection with a variety of regulatory statutes for what are commonly called "public welfare offenses,"' 356 So. 2d at 673, but it held that the Alabama Controlled Substances Act was no one of those statutes...." (Appendix "A", pp. 15-16)

that the fact that the statute did not expressly require scienter rendered the statute unconstitutionally vague.[12] This is in irreconcilable conflict with the Constitutional policy set by this Honorable Court of testing statutes for vagueness in light of authoritative judicial construction. This policy is seen most recently in Kolender v. Lawson, (____ U.S. ____, ____ L.Ed.2d____, ____ S. Ct. ____, 51 U.S. L. Wk. 4532, 4533 [1983]), where a challenged California statute was tested in light of State Court interpretation.

The Alabama Court of Criminal Appeals then confuses scienter and specific intent and concludes that both

---

12"...Because the Alabama statute sets out no scienter requirement, it fails to give fair warning to someone in appellant's position of the type of conduct which will be considered criminal...." (Appendix "A", p. 19)

are necessary to avoid vagueness under the Federal Constitution.[13] This Honorable Court has often upheld statutes which contain somewhat vague expressions, such as "unreasonable" or "marketed for use", on the grounds that the statute required that the action be willfull, intentional or knowing. E.g. Boyce Motor Lines v. United States, 342 U.S. 337, 96 L.Ed. 367, 72 S.Ct. 329 (1951); Hoffman Estates v. Flipside, ____ U.S. ____, 71 L.Ed.2d 362, 102 S.Ct. ____ (1982). However, this Honorable court has never suggested that a statute which on its

---

13"...We note that the recent holding of the United States Supreme Court in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., [____ U.S. ____, 71 L.Ed.2d 362, 102 S. Ct. ____ (1982)], supra, though not based on a criminal statute, supports our conclusion that specific intent is a necessary ingredient for fair warning in a criminal provision...." (Appendix "A", pp. 20-21)

face clearly gives notice of the outlawed conduct, precisely sets the standard of guilt and has been authoritatively construed as requiring scienter is vague because it does not also require specific intent.

It is apparent that the decision and opinion of the Court of Criminal Appeals of Alabama and the earlier Alabama cases on which it is based are in patent conflict with the decisions and policies of this Honorable court and for this reason the writ should issue so that the law of Alabama can be brought into conformity with the Constitution of the United States.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Honorable Court of Criminal Appeals and Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court on numerous different points of U.S. Constitutional law. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinion of the Honorable Courts of Alabama and on such review will reverse the decisions of said Courts holding Title 20, Section

20-2-70(b), Code of Alabama, 1975 (Appendix "C") unconstitutionally vague and reversing the conviction of Respondent McCrary.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of June, 1983, I did serve the requisite number of copies of the foregoing on the Attorneys for Joyce Glass McCrary, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

Hon. J. Louis Wilkinson
Attorney at Law
617 Frank Nelson Building
Birmingham, Alabama 35203

Hon. J. Stephen Salter
Groenendyke & Salter
Attorneys at Law
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Birmingham, Alabama 35203

JOSEPH G. L. MARSTON, III
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Office - Supreme Court, U.S.
FILED
JUN 4 1983
ALEXANDER L. STEVAS,
CLERK

82 - 1976

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

V.

JOYCE GLASS McCRARY

Respondent

APPENDIX

TO THE PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
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64 North Union Street
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ATTORNEYS FOR PETITIONER

NO._____

IN THE SUPREME COURT OF THE
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OCTOBER TERM, 1982

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ATTORNEYS FOR PETITIONER

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APPENDIX "A"

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1981-82

8 DIV. 636

Joyce McCrary

v.

State

Appeal from Jackson Circuit Court

DeCARLO, JUDGE

Possession of a counterfeit substance; ten years.

The State's evidence proved that two Scottsboro police officers, armed with a search warrant, went to appellant's residence, showed her the warrant, and told her they were authorized to search for Quaaludes or methaqualone. Upon

reading the warrant, appellant replied, "All that's here are those old fake pills," or "That's those old pills I have in the back room," or words to that effect. The appellant then brought out a bottle containing 415 white pills stamped "LEMMON 714" and scored on the back.

One of the officers familiar with the appearance of Quaaludes testified that the pills looked exactly like those containing the controlled substance to him. A preliminary analysis of the pills at Scottsboro police headquarters, however, indicated they did not contain the controlled substance methaqualone. The toxicologist's analysis, and later testimony, confirmed the finding that the capsules did not contain methaqualone or any other controlled substances, but compounds resembling aspirin and antihistamine.

An official of the Lemmon Corporation testified that his company manfactured a drug containing methaqualone, under the trade name "Quaalude." The pill is stamped "LEMMON 714" and scored on the reverse side. He testified that the pills found at appellant's residence were not manufactured by his company although they were "a very good imitation." He also stated that Lemmon had not authorized anyone to make a facsimile Quaalude.

I.

Appellant claims that her conviction should be reversed because § 20-2-70(b) of the Alabama Code 1975, was misconstrued to apply to her, or, if properly construed in its application to her, is unconstitutional.

Read in conjunction with the relevant prohibition of subsection (a),

§ 20-2070(b) provides that "any person who [possesses] a counterfeit substance enumerated in schedules I through V is guilty of a felony. ..." "Counterfeit substances" is defined in § 20-2-2(7) as follows:

> "Substances which, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, number or device or any likeness thereof of a manufacturer, distributor or dispenser other than the person who in fact manufactured distributed or dispensed the substance."

Appellant's first argument is one of statutory construction. She contends that there are no "counterfeit substance[s] enumerated in schedules I thorugh V; and that because all the drugs listed there are genuine controlled substances, the prohibition of the statute is meaningless. Next, she claims

that, since she was indicted for possession of a "counterfeit controlled substance" rather than for possession of a "counterfeit substance," the indictment does not apply to the pills in question here.

According to appellant's argument, a "counterfeit substance" is an innocent compound made to look like a controlled drug (an aspirin resembling a Quaalude), while a "counterfeit controlled substance" is one controlled drug made to look like another (heroin fashioned to resemble a Quaalude).

While we acknowledge the ambiguity of the statute, in our judgment both of these arguments are answered by a review of the legislative history and judicial construction of § 20-2-70(b) and its predecessor.

The predecessor to the current statute set out a prohibition on "counterfeit drugs" rather than on "counterfeit substances." See 1967 Ala. Acts 33, No. 252, § 1(2) (August 24, 1967). However, apparently in response to the holding of Vann v. State, 44 Ala. App. 664, 219 So. 2d 649 (1969), that section was repealed and replaced by § 20-2-70(b). See 1971 Ala. Acts 2374, No. 1407 (September 16, 1971).

In Vann, the court determined, based on the same reasoning that appellant now advances, that an indictment for possession of a "counterfeit drug" was insufficient unless it named two controlled substances: the drug possessed and the drug it was supposed to resemble. Thereafter, evidently in order to remedy the defect announced by the Vann court, the legislature altered the wording of

the section to read "counterfeit substance." Perhaps a more precise wording would have been "counterfeit of a substance."

In any event, based on the change in wording of the statute, presumedly in response to the judicial determination that a "counterfeit drug" meant one controlled substance made to look like another, we believe the legislature's intent in drafting § 20-2-70(b) was to proscribe the possession, sale, etc., of any substance (controlled or uncontrolled) which is a facsimile or imitation of a particular, identifiable controlled substance.

In view of our disposition of this appeal, based upon appellant's next argument, it is unnecessary to determine the sufficiency of the indictment.

II.

Appellant contends that § 20-2-70(b) is unconstitutionally vague and overbroad. While the statute does not offend the doctrine of overbreadth, it is, in our judgment, impermissibly vague as it applies to possession of a counterfeit substance.

The overbreadth doctrine derives from the First Amendment, see Young v. American Mini Theaters, 427 U.S. 450, 96 S. Ct. 2440, 47 L. Ed. 2d 81 (1976); Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974), and serves to invalidate legislation so sweeping that, along with its allowable proscriptions, it also restricts constitutionally-protected rights of free speech, press, or assembly, see e.g., Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). Since

there are no First Amendment rights at stake here, the overbreadth doctrine does not apply. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., ____ U.S. ____, 102 S.Ct. 1186, 1192 n. 9, ____ L.Ed.2d ____ (1982).

The doctrine of vagueness, on the other hand, originates in the due process clause of the Fourteenth Amendment, see Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), and is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful, see United States v. National Dairy Products Corporation, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963).

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is

proscribed. United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989, 996 (1954). A vague statute does not give adequate "notice of the required conduct to one who would avoid its penalties," Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367, 371 (1951), is not "sufficiently focused to forewarn of both its reach and coverage," United States v. National Dairy Products Corporation, 372 U.S. at 33, 83 S.Ct. at 598, 9 L.Ed.2d at 566, and "may trap the innocent by not providing fair warning," Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227-28 (1972).

As the United States Supreme Court observed in Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948):

> "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt."

333 U.S. at 515-16, 68 S.Ct. at 670, 92 L.Ed.2d at 849-50 (citations omitted).

The Winters Court overturned a conviction for possession with intent to sell magazines "devoted to the publication and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." Id. Noting that the provision contained no "ascertainable standard of guilt," the Court determined that "[w]here a statute is so vague as to make criminal an innocent act, a conviction

under it cannot be sustained." 333 U.S. at 520, 68 S.Ct. at 672, 92 L.Ed. at 852.

Citing Winters v. New York, the Alabama Supreme Court struck down, as unconstitutionally vague, an act punishing "any male who gazes into any place of abode, not his own or under his control, which is occupied by a female," in Kahalley v. State, 254 Ala. 482, 48 So. 2d 794 (1950). The court commented that the statute

> "marks no line between lawfulness and criminality, condemning all acts alike of the kind specified and as applied, would affect innocent beings in the ordinary pursuits of life. It leaves open the widest conceivable inquiry, the scope of which no one could foresee and the results of which no one could foreshadow and adequately guard against."

254 Ala. at 483, 48 So. 2d at 795.

Later, in Esco v. State, 278 Ala. 641, 179 So. 2d 766 (1965), the Alabama

court invalidated that portion of an enactment penalizing "any person who changes or alters his name to conceal his identity," as a uncertain and indefinite. The court observed that every name change is accomplished to conceal identity, and in the absence of a requirement of fraudulent intent, the statute penalized "conduct ... which could not be proscribed as criminal." 278 Ala. at 645, 179 So. 2d at 770.

Like the Kahalley court which listed numerous instances of innocent activity the "Peeping Tom" statute might penalize (e.g., the postman trying to deliver a package, who peeps inside to see if anyone is home; the concerned neighbor who smells smoke and looks inside to see if he can help), the Esco court also demonstrated how the "name change"

statute could include blameless conduct (e.g., the author who uses a pen name; the undercover detective who assumes an alias to ferret out crime).

Similarly, § 20-2-70(b) "marks no line between lawfulness and criminality," Kahalley v. State, supra. It proscribes the possession of a substance which, by its nature, is essentially harmless. A "counterfeit substance" becomes injurious to the public health, safety or welfare only with the addition of a specific intent on the part of its possessor to pass it off or to represent it as genuine.

Generally, all criminal statutes must contain the element of scienter. See Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); Rogers v. State, 23 Ala.App. 149, 122 So. 308 (1928), "The existence of a mens rea

is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500, 71 S.Ct. 857, 95 L.Ed. 1137, 1147 (1951).

Although a state may create strict liability offenses, the power to do so is limited by "the constitutional command that no person can be 'deprived of life, liberty, or property, except by due process of law.'" Walker v. State, 356 So. 2d 672, 673 (Ala. 1977); see Ala. Const. Art. I, § 6 (1901); Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

In Walker v. State, supra, the Alabama Supreme Court recognized the State's authority under the police power "to impose strict liability in connection with a variety of regulatory statutes for what are commonly called 'public welfare

offenses,'" 356 SO. 2d at 673, but it held that the Alabama Controlled Substances Act was not one of those statutes.

The court observed that, because the penalties for violation of the act were severe (two or fifteen years' imprisonment and a fine up to $25,000), criminal sanctions could be imposed under the act "only for blameworthy conduct." 356 So. 2d at 674. It determined that knowledge must be an essential element of illegal possession of a controlled substance.

In appelant's case, we are not dealing with illegal possession of a controlled substance, but with illegal possession of items resembling a controlled substance. Thus, some mental element other than simple knowledge of the resemblance must be present in order

to make possession of the substance "blameworthy." See Gasser v. Morgan, 498 F.Supp. 1154, 1166 (N.D. Ala. 1980). We believe, at the minimum, specific intent to represent the substance as genuine is necessary.

The lack of a specific intent requirement in the statute becomes even more apparent in view of the legislative history of the enactment. Act Number 1407, 1971 Ala. Acts 2378 (September 16, 1971) (codified at Ala. Code §§ 20-2-2 et seq.) states the following purposes:

> "To provide a Uniform Alabama Controlled Substance Act for preventing drug abuse and drug dependence, to standardize all laws in this state to be in conformity with the new Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, and to repeal existing state statutes in conflict."

The federal counterpart of § 20-2-70(b) provides in pertinent part,

the following:

> "(A) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -
>
> . . . .
>
> "(2) to create, distribute, or dispense, or posses with the intent to distribute or dispense a counterfeit substance."

21 U.S.C. § 841 (1970) (emphasis added). The federal definition of "counterfeit substance" is virtually identical to Alabama's definition of the term, except that, after the final word of the Alabama definition at § 20-2-2(6), the United States Code provision adds the following:

> "and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser."

21 U.S.C. § 802(7) (1970). The emphasized language of both the penalty

provision and the definitional section in the United States Code indicates that the federal statutes do not suffer from the same vagueness problems as the Alabama statutes. Section 841 requires specific intent. Section 802(7) requires not only some resemblance to a controlled substance or its container, but a resemblance which "thereby falsely purports or is represented to be" the genuine article.

Because the Alabama statute sets out no scienter requirement, it fails to give fair warning to someone in appellant's position of the type of conduct which will be considered criminal. Furthermore, because the definition of the term "counterfeit substance" is so uncertain that it does not distinguish between innocently or inadvertently mis-labelled substances

and those which, by their incorrect markings, purport -- or are held out -- to be the genuine article, the statute provides no "ascertainable standards of guilt" and "may trap the innocent." Winters v. New York, supra; Grayned v. City of Rockford, supra.

In our judgment § 20-2-70(b), as it pertains to possession of counterfeit substances, is unconstitutionally vague for its failure to specify either the "intent" of the possessor or the "purpose" of the mismarked substance which will be deemed criminal. See Winters v. New York, 333 U.S. at 519, 73 S.Ct. at 672, 92 L.Ed at 851-52; Esco v. State, supra; Kahalley v. State, supra.

We note that the recent holding of the United States Supreme Court in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra, though not

based on a criminal statute, supports our conclusion that specific intent is a necessary ingredient for fair warning in a criminal provision. In Hoffman Estates, the Court had before it a vagueness challenge to an Illinois regulatory ordinance requiring a license to sell drug paraphernalia.

The test applied by the Court to the Illinois enactment was whether the defendant merchandiser of drug-related items had adequate notice that its display of paraphernalia was regulated by an ordinance requiring a license for the following:

> "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs...."

Hoffman Estates, Appendix (emphasis added). Focusing on the emphasized portion of the ordinance, the Court held

that the enactment

> "requires scienter, since a retailer could scarcely 'market'items 'for' a particular use without intending that use. Under this test Flipside had ample warning that its marketing activities required a license."

102 S.Ct. at 1195. The Court also observed:

> "[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequate of notice to the complainant that his conduct is proscribed."

102 S.Ct. at 1193.

It is significant that the test of "ample warning" was satisfied by a scienter requirement in Hoffman Estates since that case dealt with a business regulation carrying only "quasi-criminal" sanctions, 102 S.Ct. at 1194, whereas the case before us concerns a purely criminal statute with "severe penalties," Walker v. State, supra. Acknowledging that the

test it applied to the Illinois ordinance was "less strict" than one it would apply to a criminal statute, 102 S.Ct. at 1193, the Court recognized that:

> "The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depend in part on the nature of the enactment."

102 S.Ct. at 1193.

We therefore hold, based on Walker v. State, supra, and the line of vagueness cases decided by the Alabama and United States Supreme Courts, that the statute under review here does not provide sufficient warning of what conduct is prohibited, and it is thereby unconstitutionally vague.

We have no choice except to reverse and remand this case for the constitutional infirmities noted. Although a court may cure the vagueness

of a statute by interpreting it to include a specific intent when none is required by the literal wording of the enactment, see United States v. International Minerals and Chemical Corporation, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971); Boyce Motor Lines v. United States, supra; Gasser v. Morgan, 498 F. Supp. 1154 (N.D. Ala. 1980), it may imply the necessary intent only if it determines that the legislature intended a specific mens rea to be an element of the crime, United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922). See also Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

In the case before us, we must conclude, based on the history of the Controlled Substances Act, that the legislature did not intend to include

the element of intent. As Judge Bowen, writing for this court in State v. Spurlock, 393 So. 2d 1052 (Ala.Crim.App. 1981) observed:

> "Alabama adopted the substance of the major provisions of the Uniform Act .... This section was an addition to the Uniform Act. In making, it a part of Alabama's 'uniform act,' the legislature had the opportunity to conform it to the language of the various penal provisions within the Uniform Act. This omission, when considered in the context of the entire act, makes it clear that it was the intention of the legislature not to include any element of intent, willfulness or knowledge. ... Since the intent of the legislature is clear, this Court cannot declare it otherwise."

393 So. 2d at 1055, 1058.

Since Alabama's act parallels the federal legislation, and one of its stated goals is "conformity with the Federal [Act]" 1981 Ala. Acts 2378, No. 1407, supra, we must presume that any

non-conformity was purposeful, and the legislature did not intend to add the element of specific mens rea to the statute.

We note, without expressing any opinion of its validity, the existence of an act recently passed by the legislature entitled the "Imitation Controlled Substances Act" which appears to be directed at the same subject matter as that addressed in § 20-2-70(b). See 1982 Ala. Acts _____, No. 426 (May 12, 1982).

For the foregoing reasons, the judgment of conviction is reversed, and the cause remanded to the Jackson Circuit Court.

REVERSED AND REMANDED.

All the Judges concur.

October 12, 1982

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

8 Div. 636

Joyce Glass McCrary

v.

State

Appeal from Jackson Circuit Court
Number CC-81-316

IT IS ORDERED that the application for rehearing be and the same is hereby overruled in the above-styled cause.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 12th day of October, 1982.

/s/ Mollie Jordan
CLERK, COURT OF CRIMINAL APPEALS OF ALABAMA

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)
)
)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing contains a full, true and correct copy of the Joyce Glass McCrary v. State, Jackson County Circuit Court Number CC-81-316, 8 Div. 636, on October 12, 1982, as the same remains of record and on file in this office.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 10th day of May, 1983.

/s/ Mollie Jordan
CLERK, COURT OF CRIMINAL
APPEALS OF ALABAMA

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

P. O. Box 351

MONTGOMERY 36101

April 18, 1983

JOHN O. HARRIS
Presiding Judge

MOLLIE JORDAN
Clerk

JOHN C. TYSON, III

JOHN P. DeCARLO

JOHN G. BOOKOUT

WILLIAM M. BOWEN, JR.

Judges

Honorable Joseph G. L. Marston, III
Assistant Attorney General
64 North Union Street
Montgomery, Alabama 36130

Dear Mr. Marston:

RE: Joyce Glass McCrary v. State of Alabama, 8 Div. 636, Jackson Circuit Court Number Cc-81-316

The Court of Criminal Appeals has today granted a stay of sixty (60) days from April 8, 1983, to allow filing of a petition for writ of certiorari in the United States Supreme Court. This stay will remain in effect until action is taken on the petition, and if petition

is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is furnished with proof of the filing of said petition in the United States Supreme Court.

Yours very truly,

/s/ Mollie Jordan
Clerk

cc: Clerk, Jackson Circuit Court
Hon. J. Louis Wilkinson, Attorney for Appellant
File

APPENDIX B

JANUARY 4, 1983

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1982-83

82-44

Ex Parte: State of Alabama
PETITION FOR WRIT OF CERTIOARI TO THE COURT OF CRIMINAL APPEALS
(Re: Joyce McCrary vs. State of Alabama)

Upon a preliminary examination of the petition in the above cause, the Court concludes that there is a probability of merit in the petition and has today granted the writ.

IT IS, THEREFORE, ORDERED that the writ issue to the Court of Criminal Appeals and that this cause stand ready for submission on briefs or oral argument, if so desired, in accordance with Rule 39, Alabama Rules of Appellate Procedure.

PER CURIAM.
ALL THE JUSTICES CONCUR.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of

the instrument(s) herewith set out as same appears on record in said Court.

Witness my hand this 4th day of Jan. 1983.

/s/ Dorothy F. Norwood
Acting Clerk, Supreme Court of Alabama

MAILING ADDRESS: Telephone: 832-6480

P. O. Box 157
Montgomery,Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

January 31, 1983

Re: 82-44
Ex Parte: State of Alabama
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Joyce McCrary v. State of Alabama)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____Appeal docketed. Future correspondence should refer to the above number.

____Court Reporter granted additional time to file reporter's transcript to and including

____Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____Appell____ granted 7 additional days to file briefs to and including

____Appellant(s) granted 7 additional days to file briefs to and including

____Record on Appeal filed

____Appendix Filed

xxxxSubmitted on Briefs of Petitioner.

____Petition for Writ of Certioari denied. No opinion.

____Application for rehearing overruled. No opinion written on rehearing.

____Permission to file amicus curiae briefs granted

____

/s/ Dorothy F. Norwood
Acting Clerk, Supreme
Court of Alabama

1-31-83

WO

MAILING ADDRESS: TELEPHONE: 832-6480
P. O. Box 157
Montgomery,Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

April 8, 1983

Re: 82-44
Ex Parte: State of Alabama
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Joyce McCrary v. State of Alabama)
APPELLANT APPELLEE

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____ Appeal docketed. Future correspondence should refer to the above number.

____ Court Reporter granted additional time to file reporter's transcript to and including

____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____ Appell____ granted 7 additional days to file briefs to and including

____ Appellant(s) granted 7 additional days to file briefs to and including

____Record on Appeal filed

____Appendix Filed

____Submitted on Briefs of Petitioner.

____Petition for Writ of Certioari denied. No opinion.

____Application for rehearing overruled. No opinion written on rehearing.

____Permission to file amicus curiae briefs granted

XXXX WRIT QUASHED AS IMPROVIDENTLY GRANTED; NO OPINION ISSUED.

Shores, J. - All the Justices concur.

/s/ Dorothy F. Norwood
Acting Clerk, Supreme
Court of Alabama

4-8-83

wo

APPENDIX C

CODE OF ALABAMA, 1975
TITLE 20,

§ 20-2-1. Short title.

This chapter may be cited as the Alabama Uniform Controlled Substances Act. (Acts 1971, No. 1407, p. 2378, § 511)

§ 20-2-2. Definitions.

When used in this chapter, the following words and phrases shall have the following meanings, respectively, unless the context clearly indicates otherwise:

...

(5) CONTROLLED SUBSTANCE. A drug, substance or immediate precursor in schedules I through V of article 2 of this chapter.

(6) COUNTERFEIT SUBSTANCE. Substances which, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, number or device or any likeness thereof of a manufacturer, distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the substance. ...

* * *

§ 20-2-70. Prohibited acts A.

(a) Except as authorized by this chapter, any person who possesses, sells,

furnishes, gives away, obtains or attempts to obtain by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or written order or by the concealment of material fact or by use of false name or giving a false address controlled substances enumerated in schedules I, II, III, IV and V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more than 15 years and, in addition, may be fined not more than $25,000.00; provided, that any person who possesses any marihuana for his personal use only is guilty of a misdemeanor and, upon conviction for the offense, shall be imprisoned in the county jail for not more that one year, and in addition, shall be fined not more than $1,000.00; provided further, that the penalties for the subsequent offenses relating to possession of marihuana shall be the same as specified in the first sentence of this subsection.

(b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more than 15 years and may be fined not more than $25,000.00. (Acts 1871, No. 1407, p. 2378, § 401.)

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of June, 1983, I did serve the requisite number of copies of the foregoing on the Attorneys for Joyce Glass McCrary, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

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FILED
SEP 22 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1976

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

* * * * * * * * * * * * * * * * *

STATE OF ALABAMA,

Petitioner,

vs.

JOYCE GLASS McCRARY,

Respondent

* * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * * * * * * *

BRIEF FOR THE RESPONDENT IN OPPOSITION

* * * * * * * * * * * * * * * * *

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ATTORNEYS FOR RESPONDENT

NO. 82-1976

IN THE SUPREME COURT OF THE
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QUESTIONS PRESENTED

1. Does a party who is convicted under a criminal statute have standing to raise the unconstitutionality of the statute?

2. Is a statute which lacks a specific intent provision and does not adequately describe the conduct sought to be restrained unconstitutionally vague?

PARTIES

In the Circuit Court of Jackson County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Joyce McCrary, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Jackson County, Alabama and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

McCrary v. State, 429 So.2d 1121 (Ala.Cr.App. 1982)

The order of the Supreme Court of Alabama is reported as follows:

Ex parte: State; In re: McCrary v. State, 429 So.2d 1121 (Ala.Cr.App. 1982)

JURISDICTION

The Petitioner has invoked this Honorable Court's jurisdiction under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Criminal Appeals of Alabama found the statute under which the Respondent was convicted to be repugnant to the Fourteenth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

At issue in this case is the constitutionality of Title 20, Section 20-2-70(b), Code of Alabama, 1975. A copy of this statute has been submitted in Petitioner's Appendix "C".

STATEMENT OF THE CASE AND FACTS

I

After being convicted in the Circuit Court of Jackson County, Alabama, for possession of a counterfeit controlled substance, the Respondent appealed to the Alabama Court of Criminal Appeals.

On August 24, 1982, the Honorable Court of Criminal Appeals of Alabama reversed the Respondent's conviction on the grounds that the statute under which she was convicted is unconstitutionally vague. The State filed an application for rehearing which was overruled on October 12, 1982.

The State filed a Petition for Writ of Certiorari with the Supreme Court of Alabama, and the State Supreme Court granted the writ. However, on April 8, 1983, the Alabama Supreme Court quashed the writ "as improvidently granted" and issued no opinion.

II

The Petition is based on the following facts, as found by the Court of Criminal Appeals of Alabama:

> "The State's evidence proved that two Scottsboro police officers, armed with a search warrant, went to appellant's residence, showed her the warrant, and told her they were authorized to search for Quaaludes or methaqualone. Upon reading the warrant, appellant replied, 'All that's here are those old fake pills,' and "That's those old pills I have in the back room,' or words to that effect. The appellant then brought out a bottle containing 415 white pills stamped "LEMMON 714" and scored on the back.
>
> "One of the officers familiar

with the appearance of Quaaludes testified that the pills looked exactly like those containing the controlled substance to him. A preliminary analysis of the pills at Scottsboro police headquarters, however, indicated they did not contain the controlled substance methaqualone. The toxicologist's analysis, and later testimony, confirmed the finding that the capsules did not contain methaqualone or any other controlled substances, but compounds resembling aspirin and antihistamine.

"An official of the Lemmon Corporation testified that his company manufactured a drug containing methaqulaone, under the

trade name 'Quaalude.' The pill is stamped 'LEMMON 714' and scored on the reverse side. He testified that the pills found at appellant's residence were not manufactured by his company although they were 'a very good imitation.' He also stated that Lemmon had not authorized anyone to make a facsimile Quaalude. . . ."

McCrary v. State, 429 So.2d 1121, 1122.

SUMMARY OF THE ARGUMENT

In response to the arguments put forth by the Petitioner in his brief to this Honorable Court, the Respondent would argue as follows:

1. The Respondent has standing to challenge the constitutionality of the statute in question by virtue of the fact that she was convicted of a criminal offense under said statute and she has a vested interest in the outcome of this pending action.

2. The statute was properly declared unconstitutional by the Alabama Court of Criminal Appeals on the ground of vagueness. The statute did not properly define a specific criminal act and is "so vague as to make criminal an innocent act." Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840, 852 (1948). The statute lacks the necessary specific intent that is necessary to give the act the required degree of specificity

needed for giving adequate warning of criminal conduct.

ARGUMENT

I

The Petitioner initially contends to this Honorable Court that the Respondent, Joyce Glass McCrary, does not have standing to question the constitutionality of the criminal statute under which she was convicted and sentenced to ten years imprisonment.

It is unclear from the Petitioner's brief exactly what theory they are proposing to substantiate their claim of insufficient standing. Petitioner refers repeatedly to hypothetical cases that are being applied to "others", but Respondent fails to see how this is applicable to her case. The trial and subsequent conviction of the Respondent was certainly not hypothetical and should this Court reverse the decision of the Alabama

Court of Criminal Appeals, the ten year custodial sentence will not be served by "others", but by the Respondent, Joyce McCrary. Ms. McCrary did not raise the vagueness issue as to others, but founded her contentions on the premise that §20-2-70(b) of the Code of Alabama 1975, is unconstitutionally vague as applied to her. The statute was not specific and clear to the extent that she knew she was violating the law.

The cases relied on by the Petitioner were, for the most part, misconstrued and apparently in some instances taken out of context.

The opinion of the Alabama Court of Criminal Appeals (Pet.App. 1) cites two Alabama Supreme Court cases in support of their decision which the Petitioner claims are contrary to this Court's "policy on standing to raise the alleged vagueness of a statute." (Pet.20) The cases so cited are Kahalley v. State, 254 Ala. 482, 48 So.2d 794 (1950) and Esco v. State, 278 Ala. 641, 179 So.2d

766 (1965).

The Kahalley case deals with a conviction for unlawful peeping. The Alabama Supreme Court held that the statute Kahalley was convicted of having violated was unconstitutional under the Fourteenth Amendment to the United States Constitution in that it was vague and uncertain.

Esco, supra, concerns a statute that made it a crime to change or alter a name "with the intent to defraud or with the intent to avoid payment of any debt, or to conceal his or her identity." 179 So.2d 766, 767. Esco was indicted for changing or altering his name to conceal his identity. The Alabama Supreme Court found that it was vague and indefinite, an unconstitutional act under the Fourteenth Amendment to the United States Constitution.

Petitioner is alleging that these cases are in conflict with cases of this Court because they "tested statutes for vagueness against '. . . hypothetical cases which may never arise. . .'".

(Pet. 18-19) Such an allegation is unfounded. Kahalley and Esco were both predicated upon actual criminal occurrences. In each case a person had been tried and convicted under the statutes in question and in each the conduct was described. (Kahalley was convicted of unlawful peeping and Esco for changing his name to coneal his identity.) The Petitioner has apparently confused examples given by the court in each case as to how the given statutes could conceivably be misapplied with "hypothetical cases." The decisions in these cases were not made on hypothetical facts. The Petitioner is in error.

In attempting to support their hypothesis the Petitioner cites a more recent Alabama Supreme Court case, Blood Brothers Inc. v. Alabama Alcoholic Beverage Control Board, 386 So.2d 220 (S.Ct. Ala. 1980), and several United States Supreme Court cases. Each can be distinguished from Kahalley and Esco, and the case at bar.

In Blood Brothers, supra, the Alabama Supreme Court reversed a decision of the Alabama Court of Civil Appeals wherein a regulation of the Alabama Alcoholic Beverage Control Board Rules and Regulations was declared unconstitutionally vague. The petitioner's liquor license had been revoked when it was determined that topless dancers had performed in the club. The Alabama Supreme Court stated that the Court of Civil Appeals had premised its decision on cases dealing with standing in a First Amendment light and since the First Amendment rights were not involved in this situation then the reliance was incorrect. The Court ruled that the statute was not unconstitutionally vague as to the petitioner, that the petitioner did not have standing, and since the case did not involve First Amendment rights the petitioner could not raise the issue on behalf of third parties. The Court also noted that the United States Supreme Court had previously held that under the Twenty-

First Amendment the states have the power to control intoxicating liquors.

In Young v. American Mini Theatres, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), the case dealt with an action for injunctive relief and a declaratory judgment against the city of Detroit, alleging that two city ordinances be declared unconstitutional. One ordinance dealt with requiring adult theaters to be licensed and the other concerned zoning of adult theaters. The United States Court of Appeals for the Sixth Circuit held that the ordinances were violative of the equal protection clause in that they "imposed a prior restraint on constitutionally protected communication." The respondents in that case also raised the vagueness question. The Petitioner cites the Young case, apparently to bolster their argument that "The long standing policy of this Honorable Court is against examining allegations of vagueness against 'hypothetical cases which

may never arise. . .' ." (Pet. 24) However, a close study of Young will reveal that the respondents in that case acknowledged that "there is no uncertainty about the impact of the ordinances on their own rights." 49 L.Ed.2d 310, 319. The issue of vagueness in Young was not applicable to the respondents. This Court went on to say that in areas of First Amendment violations a respondent could, under certain conditions, "assert the rights of third parties", but the Young case did not fall into any such category. The ordinances involved were capable of narrow construction by the court and therefore this Court would not consider hypothetical cases of "persons not before the court."

The third case relied on heavily by the Petitioner is New York v. Ferber, __U.S.__, 73 L.Ed.2d 1113, 102 S.Ct. __ (1982). Here again, the Petitioner is ostensibly claiming that the Respondent is challenging the unconstitutionality of the statute in that it is vague as applied to others. Citing

Ferber as support is not persuasive. Ferber deals with a violation of a law prohibiting the promotion of child pornography. The New York Court of Appeals held the statute to be unconstitutional as a violation of the First Amendment in that it was overbroad and underinclusive. This Court held that the conduct proscribed in the statute did not have the protection of the First Amendment. The quotation from Ferber (Pet. 25) is taken out of context. The Ferber court was dealing with construction of the overbreadth doctrine. Furthermore, in the instant case the Respondent has not challenged the statute "on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. . ." 73 L.Ed2d 1113, 1129. What is even more interesting is that this Honorable Court never said that Ferber did not have standing to challenge the constitutionality of the criminal statute he was convicted under, as the Petitioner would have us believe.

It is ludicrous for the Petitioner to submit to this Court that an individual who is convicted of a specific criminal offense does not have standing to challenge the constitutionality of the said law. The Petitioner is asking this Honorable Court to completely disregard the inherent rights of every citizen. Who should raise the constitutionality of a law if not the person whose liberties are violated? The basic textbook principle of standing is that the party involved has a vested interest in the outcome of the action. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). In the case before this Court the only person who has an interest in the outcome is the Respondent. The Petitioner's allegations that the Respondent does not have standing is erroneous.

II

The Petitioner's second assertion is that the Alabama Court of Criminal Appeals improperly held that the statute in question is void for vagueness. The statute under consideration is set out in Petitioner's Appendix "C" p. 37-38. The Respondent was specifically convicted for having in her possession pills containing aspirin and antihistamine (non-controlled substances) which resembled Quaaludes, a controlled substance.

The alleged violated provision of the statute, §20-2-70(b), Code of Alabama 1975, reads as follows:

> (b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony and, upon conviction, for the first offense may be imprisoned

for not less than two nor more than 15 years and may be fined not more than $25,000.000.

Section §20-2-2(6) defines the term counterfeit substance in the following manner:

> Substances which, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, number or device or any likeness thereof of a manufacturer, distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the substance.

The Respondent was convicted for being in possession of the counterfeit pills.

The Alabama Court of Criminal Appeals determined that the statute in question

> "is unconstitutionally vague for its failure to specify either the

'intent' of the possessor or the 'purpose' of the mismarked substance which will be deemed criminal."

McCary v. State, 429 So.2d 1121, 1126.

In United States v. Harriss, 347 U.S. 612, 98 L.Ed 989, 74 S.Ct. 808 (1954), this Court stated the following accepted principle:

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

The statute in question could not possibly have given Respondent notice that her possession of harmless pills containing over-the-counter medication was a criminal offense.

In its decision the Alabama Court of Criminal Appeals noted that the Uniform Alabama Controlled Substance Act, of which the questionable statute is a part, was adopted by our legislature to "be in conformity" with the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970. The appellate court held that since the Alabama legislature did not include in the state act the specific intent provisions contained in the Federal act then the act is to be construed from the view that it lacks specific intent. By not stating with certainty what provisions the Act prohibits, the court was correct in declaring it void for vagueness.

In reading the sections dealing with controlled substances it is apparent that the language leaves

the statutes open to various constructions which were surely not the intent of the legislature and also raises further questions as to what conduct is covered under the act.

A literal interpretation of the Act would make it a crime for a person to have in his medicine cabinet "Bufferin" in a container labeled "Excedrin". Is a "counterfeit substance" a counterfeit of a controlled substance which is itself a controlled substance or is it a counterfeit of a controlled substance which is a compound of non-controlled ingredients? Is it a violation of this statute for two different aspirin tablets to resemble each other, or is the application strictly limited to controlled substances listed elsewhere in the Act? Is a plain white tablet which coincidently looks like another plain white tablet that containes a controlled substance subject to this statute?

Many actions are innocent until the element of specific intent is injected which in effect re-programs the actions to become something of a criminal nature.

> "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."

Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed 840, 852 (1948).

The reasoning in Winters has been carried forward in subsequent cases.

In New York v. Ferber, supra,

> "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."

73 L.Ed.2d 1113, 1127

Ferber, deals with child pornography laws and held that the laws had to list the acts for-

bidden with "sufficient precision". The statute being considered by the Ferber court "expressly includes a scienter agreement." 73 L.Ed.2d 1113, 1128. The statute was determined not to be underinclusive.

Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 71 L.Ed.2d 362, 102 S.Ct. 1186, reh. den. 71 L.Ed.2d 476, 102 S.Ct. 2023 (1982) considered the vagueness of a city ordinance requiring business to obtain a license to sell drug paraphernalia. The Court's decision was that the ordinance was not unconstitutionally vague or overbroad.

> "The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vague-

ness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."

71 L.Ed.2d 362, 372.

The Hoffman Estates ordinance contained a scienter requirement.

The very recent case of Kolender v. Lawson, (__U.S.__, __L.Ed.2d __, __S.Ct.__) 51 U.S.L.Wk. 4532 (1983), concerns a California statute which required persons who "loiter or wander" the streets to have available "credible and reliable" identification when requested by a police officer. This Court reversed, holding that the statute was vague under the Fourteenth Amendment because it was not specific as to "credible and reliable" identification.

"the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definitiness that ordinary people can

understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

51 U.S.L.Wk. 4532, 4533.

It is evident from these cases that the inclusion or omission of a specific intent provision can weigh heavily in the determination of vagueness.

In applying the foregoing case law to the instant case it is readily apparent that the lack of the requisite specific intent will cause the statute to be held vague. An "ordinary" person would not be cognizant that having possession of pills which look like other drugs is a crime. As the Court of Criminal Appeals pointed out, the harm in having possession of such substances is the intentional sale or distribution of them under the false label.

Kolender, supra, and Ferber, supra, also give weight in their decisions to the construction that the state court has given a statute. The Petitioner seems to have had difficulty with the construction that our state court has placed on the statute under consideration.

In its opinion, the state court cited Walker v. State, 356 So.2d 672 (Ala. 1977) which held that although the state had authority under the police power to impose strict liability on certain public welfare offenses, the Alabama Controlled Substances Act was not included, so strict liability was not applied to that act. But, the court went on to say that in order to sustain the illegal possession of controlled substances there must be knowledge on the part of the possessor. However, the court, in its opinion on the present case stated that since the Respondent did not have possession of controlled substances as in Walker, but had possession of non-controlled substances "resembling"

a controlled substance then a higher degree of knowledge, specific intent, must be present.

However, we are still left with the question of specific intent to do what, with what? The Respondent had certain non-controlled substances in her possession, but where is the crime? Unlike a crime which is malum in se, the statutes we are dealing with are malum prohibitum and by their very nature must expressly state the conduct that has been deemed criminal by a law making body. A clear and specific offense must be set forth so that the actions of a person can be conformed to fall within the law. See Kahalley v. State, supra, and Esco v. State, supra. A statute which makes an heretofore acceptable act criminal by virtue of legislation is mandated to clearly express the intent of the authors so that all people can be put on notice as to the now illegal conduct. Such is not the case presently before this Honorable Court. Section 20-2-70(b), Code of Alabama 1975

does not set forth the standards by which the statute is to be measured to determine if there has been a violation. The statute is facially vague and should be so held.

CONCLUSION

The Respondent respectfully submits to this Honorable Court that the decisions of the Alabama Court of Criminal Appeals and the Alabama Supreme Court should be upheld.

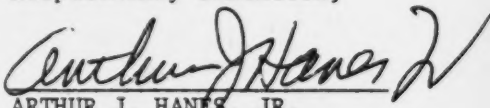
The contention of the Petitioner that the Respondent lacks standing is without merit. The cases cited by the Petitioner as being in conflict with decisions of this Court can be distinguished. There is no patently fatal conflict between the laws of Alabama and the laws of this Court. Each case must be analyzed in the light of its own distinct facts. No two cases can be alike in all respects.

The Petitioner's assertion that the statute is not vague is likewise erroneous. When a

statute cannot be interpreted by ordinary people so that the meaning of the criminal act sought to be proscribed is apparent then the act is vague.

The Respondent has been convicted under a statute that did not give her notice of the criminal act prohibited and such is a violation of her rights under the Due Process clause of the Fourteenth Amendment. For this reason the Petition for Writ of Certiorari filed by the State of Alabama should be denied.

Respectfully submitted,



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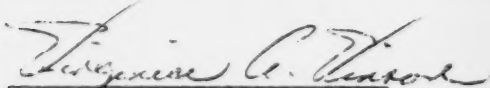
Attorney for Respondent



VIRGINIA A. VINSON
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari has been mailed to the attorneys for the Petitioner, first class, postage prepaid, this the 21 day of September, 1983, and addressed as follows:

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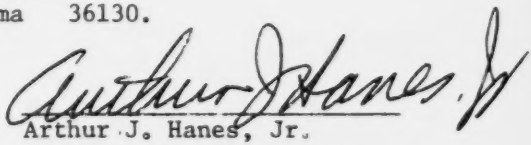

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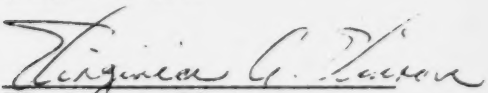

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